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Supreme Court of The United States

October Term, 1996

RUI TAVORA,

Petitioner,

- against -

NEW YORK MERCANTILE EXCHANGE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether current United States Supreme Court precedent precludes the existence of a small or *de minimis* issues exemption under Title VII.

II. Whether current United States Supreme Court precedent holds that all gender conscious employment policies violate Title VII unless the employer can demonstrate that the policies meet the strict requirements of the bona fide occupational qualification or business necessity defenses.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

RUI TAVORA, *Petitioner*,

against

NEW YORK MERCANTILE EXCHANGE, *Respondent*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Rui Tavora, petitions for a writ of certiorari to review the Judgment of the Second Circuit Court of Appeals in this case which affirmed the district court's dismissal of the plaintiff's complaint under F.R.Civ.P. 12(b)(6).

OPINIONS BELOW

The order and opinion of the Court of Appeals (Appendix, *infra*, at A-1 to A-6, hereinafter cited just by page number) is unreported at this time. The district court rendered no opinion, but the reasons for the district court's order of dismissal (A-24 to A-25) were set forth on the record (A-16 to A-21).

JURISDICTION

The Court of Appeals entered its judgment on December 12, 1996. Jurisdiction is conferred on this Court by 28 U.S.C.

§ 2101(c).

Federal subject matter jurisdiction is conferred by 28 U.S.C. § 1331, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

STATUTORY PROVISION

The following sets out verbatim the primary statutory provision involved in this case, which defines the employment practices covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.:

It shall be an unlawful employment practice for an employer --

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

STATEMENT

The respondent, New York Mercantile Exchange

("NYMEX"), once employed the petitioner, Rui Tavora, as reporter of trades on the floor of the New York Commodities Exchange. (A-10.). NYMEX terminated Mr. Tavora's employment when Mr. Tavora refused to comply with NYMEX's grooming policy relating to hair length. (A-10 to A-11.) The grooming policy limits the length of a man's hair, but provides no similar restriction on the length of a woman's hair. (A-11.)

After receiving a right to sue letter from the United States Equal Employment Opportunity Commission, (A-7), Mr. Tavora filed this action in the United States District Court for the Southern District of New York. Before answering, NYMEX moved to dismiss. (A-14 to A-15). NYMEX's motion relies on a line of older decisions, including one decision of the Second Circuit, which essentially found gender conscious employment policies to be gender neutral.

Judge John E. Sprizzo granted NYMEX's motion, (A-16 to A-25), finding that the issue raised in the complaint was too unimportant to be addressed by Title VII. (A-17 to A-21.) Judge Sprizzo reasoned, essentially, that the practice complained of in this matter was exempt under Title VII, under a small issues exemption that is nowhere supported by law. (A-18 to A-19.)

Mr. Tavora appealed to the United States Court of Appeals for the Second Circuit. In a per curiam decision, dated December 12, 1996, the Second Circuit affirmed the District Court decision, stating that the type of employment policies at issue in this case are either "not within the statutory goal of equal employment . . . or . . . have only a *de minimis* effect." (A-5.) In other words, the Second Circuit found that gender specific policies having to do with hair length are exempt from Title VII.

REASONS FOR GRANTING THE PETITION

The Second Circuit has decided an important question of federal law in a way that conflicts with the relevant decisions of this Court. The Second Circuit decision for which the petitioner seeks certiorari represents such a departure from accepted law under Title VII as to require the exercise of this Court's supervisory power. Specifically, the Second Circuit decision states that gender specific employment policies are not violations of Title VII, even though the policies may not meet the requirements of any accepted exemption from the requirements of Title VII. The Second Circuit has craved out significant, non-statutory exemption to the prohibitions contained in Title VII. The decisions of this Court, however, establish that gender conscious employment policies nearly always are covered by and violate Title VII.

I. Current United States Supreme Court Precedent Precludes the Existence of a Small or *De Minimi* Issues Exemption under Title VII

Essentially, the decisions of the Second Circuit and the District Court state that a hair grooming policy that makes an explicit distinction based on gender is too unimportant an issue to be addressed by Title VII. (A-5, A-18 to A-19.) The petitioner, of course, disagrees with the factual position that the policy at issue in this case is unimportant. It is obvious that the employer believes that the issue is important in that the employer imposed the maximum sanction that an employer can impose on an employee: termination. (A-10.) In any case, this Court has stated that, once a plaintiff establishes that a policy is facially discriminatory, the imposition of any further burden of proof on the plaintiff would be "wholly inconsistent with settled Title VII law." *Autoworkers v. Johnson Controls, Inc.*, 499 U.S. 187, 197, 111 S.Ct. 1196, 1202, 113 L.Ed.2d 158 (1991).

Thus, it would be wholly inconsistent with settled Title VII law to require the plaintiff to prove, not only that an employment policy is facially discriminatory, but also to prove that the policy is important enough to be covered by Title VII.

In a sense, Title VII is a narrowly written law having a narrow application to the arena of employment. For example, Title VII does not cover all employers, only employers with 15 or more employees. 42 U.S.C. § 2000e(b) (defining the term *employer*). It does not cover all forms of discrimination, but only certain forms, including discrimination based on gender. 42 U.S.C. § 2000e-2 (specifying only discrimination based on race, color, religion, sex and national origin as covered by the statute).

However, Title VII covers any practice having to do with employment. *See Hishon v. King & Spalding*, 467 U.S. 69, 77, 104 S.Ct. 2229, 2234, 81 L.Ed.2d 59 (1984). The language of the provision defining the practices covered by Title VII, 42 U.S.C. § 2000e-2(a), quoted *supra*, is expansive, and drafted to cover the entire spectrum of employment practices. There is absolutely nothing in the statute indicating that small or *de minimis* issues (however *small* or *de minimis* might be defined) are exempted from its coverage. If anything, the decisional law of this Court supports a conclusion that there is no small issues exemption to Title VII.

This is clear from the expansive language used by this Court in describing the coverage of Title VII. For example, in *Autoworkers v. Johnson Controls, Inc.*, 499 U.S. 187, 197, 111 S.Ct. 1196, 1202, 113 L.Ed.2d 158 (1991), the Court stated:

> Section 703(a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. § 2000e-2(a), prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's

status.

In other words, not only does Title VII cover any term or condition of employment, and all hiring and discharging decisions, but also all other employment decisions. Further, there is nothing in Title VII exempting any "employer's idiosyncratic requirements." *See Johnson Controls*, 499 U.S. at 201, 111 S.Ct. at 1205.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 109 S.Ct. 1775, 1785, 104 L.Ed.2d 268 (1989), this Court stated that "gender must be irrelevant to employment decisions." The Court added no limiting language, like, "except when a court might consider an issue to be unimportant." All employment decisions are covered, not just those subjectively deemed important enough to deserve Title VII's coverage. "Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities." *Price Waterhouse*, 490 U.S. at 242, 109 S.Ct. at 1786.

More than one decision of this Court has stated that Title VII was intended to address "the entire spectrum of disparate treatment of men and women." *Harris v. Forklift Systems, Inc.*, -- U.S. -- , 114 S.Ct. 367, 370 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49(1986); *City of Los Angeles v. Manhart*, 435 U.S. 702, 707 n. 13, 98 S.Ct. 1370, 1375 n. 13, 55 L.Ed.2d 657 (1978), *quoting Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). Again, none of these cases created any kind of exception for issues that might subjectively be considered minor. "Title VII prohibits all discrimination in employment based upon race, sex, and national origin." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981). There is no authority, in the statute or the decisional law, supporting the existence of a small or *de minimis* issues exemption to Title VII.

II. Current United States Supreme Court Precedent Holds That All Gender Conscious Employment Policies Violate Title VII Unless the Employer Can Demonstrate That the Policies Meet the Strict Requirements of the Bona Fide Occupational Qualification or Business Necessity Defenses

The decision of the Second Circuit, and of the District Court, was based in large part on the reasoning of an old line of cases that created an exemption to Title VII based on often inconsistent and confusing distinctions based on personal characteristics. Under the reasoning of this line of cases, explicitly gender conscious employment policies were considered to be gender neutral, and, thus, not within the goals of Title VII. Although no decision of this Court has ever explicitly addressed the reasoning in this line of cases, this Court has nonetheless rejected the convoluted reasoning contained in these cases.

A. Policies Making Explicit Distinctions Based on Gender are Facially Discriminatory and Violate Title VII

Significant changes in Title VII law began with *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). In *Gilbert*, this Court found an employment policy which limited health benefits for pregnancy to be valid under Title VII. The Court upheld the policy reasoning that no distinction was being made on gender. Rather, the policy made a distinction on the basis of a health condition, pregnancy. Thus, according to the Court, the policy was really gender neutral.

The reasoning relied upon by the Court in *Gilbert* is analogous to the reasoning relied upon by the courts in the decisions cited by the Second Circuit and District Court (which

will be referred to collectively as "the grooming cases"). *Gilbert* and the grooming cases say that the policies at issue are gender neutral, even though the policies at issue made explicit distinctions based on gender. The grooming cases differ from *Gilbert* only in that the grooming cases justify their gender conscious policies by stating that employers are only exercising their choice of how to run their businesses and rely on a characteristic (hair length) which is not immutable. Under this line of reasoning, a policy requiring shorter hair on men than women is gender neutral in that it is only a business decision.

The aftermath of the *Gilbert* decision included the 1978 Amendments to the Civil Rights Act of 1964, P.L. 95-555 (Oct. 31, 1978), otherwise known as the Pregnancy Discrimination Act. According to this Court's decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983), "Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), but also rejected *the test of discrimination* employed by the Court in that case." *Newport News*, 462 U.S. at 676, 103 S.Ct. at 2627 (emphasis added). In other words, Congress and, subsequently, this Court rejected the method of reasoning in *Gilbert* which made policies that distinguish on the basis of gender gender-neutral by use of an artificial distinction.

The decision in *Newport News* arose from a policy which explicitly gave female employees greater health benefits than the spouses of male employees. The employer in *Newport News* argued that this policy was gender neutral in that it was based on employment status. However, the Court rejected the employer's reasoning. The Court stated that "Congress had always intended to protect *all* individuals from sex discrimination in employment." *Newport News*, 462 U.S. at 681, 103 S.Ct. at 2630 (emphasis in original). It found that Title VII protects both male and female employees. *Newport*

News, 462 U.S. at 682, 103 S.Ct. at 2630. Most important, this Court returned to a simple "but-for" test for determining whether an employment policy facially discriminates on the basis of gender in violation of Title VII. *Newport News*, 462 U.S. at 682-83, 103 S.Ct. at 2630-31. It turned to a test that it had earlier relied upon in *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978).

The *Manhart* decision concerned a pension policy which required women to pay a higher pension contribution than men. One of the interesting points about *Manhart* is that the parties agreed that women as a class lived longer than men as a class. *Manhart*, 435 U.S. at 707-08, 98 S.Ct. at 1375. This fact formed the primary basis for the employer's justification of the policy. *Manhart*, 435 U.S. at 713, 98 S.Ct. at 1377.

The Court rejected the employer's admittedly fact-based, as opposed to stereotype-based, justification, saying that Title VII protects individuals, not just classes. *Manhart*, 435 U.S. at 708 & 713, 98 S.Ct. at 1375 & 1377. The Court found the policy to be discriminatory on its face, and therefore illegal. *Manhart*, 435 U.S. at 716, 98 S.Ct. at 1379. It found the policy to be discriminatory based on the following "simple test": "[W]hether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Manhart*, 435 U.S. at 711, 98 S.Ct. at 1377, *quoting* "Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964," 84 Harv.L.Rev. 1109, 1170 (1971).

In its decision, the Court made special note of the changes wrought by the enactment of Title VII. Before Title VII, "an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women." *Manhart*, 435 U.S. at 707, 98 S.Ct. at 1375. However, after the passage of this law, "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of

males and females." *Id.* Thus, it is now not enough for an employer to justify a facially discriminatory policy with a position that such a policy should be permitted because the employer believes that men should have short hair and women long hair. This type of stereotypical reasoning does not convert a facially discriminatory policy into a facially neutral policy.

There is nothing indicating that this Court has in any way moved away from or limited the simple "but-for" test of *Manhart*. If anything, the Court has moved in a direction which clarifies and strengthens *Manhart*'s test.

In *Autoworkers v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991), a decision which the petitioner cited both to the Second Circuit and the District Court, but the Second Circuit ignored completely, this Court applied the *Manhart* test to a case not involving pension or health benefits, and again found the employment policy facially discriminatory. In *Johnson Controls*, the employer had a policy limiting the employment opportunities of women of childbearing age, but had no similar policies for men. The employer attempted to justify the policy by saying it was really based on a concern for the unborn fetus. The employer described its motive as a benevolent motive, a description which the Court never rejected.

However, the Court found the policy to be facially discriminatory. *Johnson Controls*, 499 U.S. at 197, 111 S.Ct. at 1202. The policy was found to be facially discriminatory because it placed a burden on employees of one gender without placing a similar burden on employees of the other gender. *Johnson Controls*, 499 U.S. at 197-99, 111 S.Ct. at 1203. The Court further stated that

> [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves

> disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. . . . The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination.

Johnson Controls, 499 U.S. at 199, 111 S.Ct. at 1203-04. Thus, in determining whether a policy is facially discriminatory, the key consideration should be the terms of the policy itself. If the policy explicitly makes a distinction on the basis of gender, the policy, no matter how justified, is a violation of Title VII without more. *Johnson Controls*, 499 U.S. at 198, 111 S.Ct. at 1203.

Manhart's simple "but-for" test as amplified by *Johnson Controls* requires the application of nothing more than common-sense. As noted by this Court elsewhere, in applying Title VII to a particular case, common-sense should never be left at the door. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241, 109 S.Ct. 1775, 1786, 104 L.Ed.2d 268 (1989). Thus, if a policy on its face makes a distinction on the basis of gender, it violates Title VII no matter what distinctions an employer cares to make or offers in justification. It makes no difference under the *Manhart-Newport News-Johnson Controls* test that a policy is based on a mutable or immutable characteristic. If the policy makes a gender based distinction, it violates Title VII, unless the policy can satisfy the strict requirements of either the business necessity or bona fide occupational qualification defenses.

Most of the authority cited above postdates the authority cited by the Second Circuit in support of its decision. Thus, the grooming cases generally do not reflect or take into account the changes in the law since the *Gilbert* decision. Most significantly, the grooming cases fail to take into account the test of a facially discriminatory policy found in the *Manhart*,

Newport News and *Johnson Controls* decisions.

B. The Grooming Cases Created a Non-Statutory Exemption to Title VII which Later Authority Rejects

The Second Circuit cites *Longo v. Carlisle DeCoppet & Co*, 537 F.2d 685 (2d Cir. 1976), and *Seitz v. O'Connor*, 1995 W.L 745012 (E.D.N.Y. Nov. 30, 1995) to support its decision dismissing the complaint in this matter. *Seitz* relies on *Longo* without providing much other reasoning. Thus, *Seitz* provides no guidance.

Longo appears to concern a facially discriminatory policy similar to the one in this case. However, the Second Circuit provided no rationale for its holding in *Longo*. The Second Circuit's decision in this case, compared to the *Longo* decision, provides much more information about the Second Circuit's thinking. In any case, in *Longo*, the Second Circuit simply adopted the holdings of four other circuit courts, without necessarily agreeing with the reasoning in those other decisions.

The circuit court decisions cited in *Longo* reviewed the scant legislative history of the gender provision of Title VII, and concluded that Congress did not intend to reach all types of employment practices based on gender. *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d. 1349, 1351 (4th Cir. 1976); *Knott v. Missouri Pc. Ry. Co.*, 527 F.2d 1249, 1251-52 (8th Cir. 1975); *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975); *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); *Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1121 (D.C.Cir. 1973). In reaching this conclusion, the circuit courts said that the gender portion of Title VII reaches only those employment practices which would deny a person a job or a promotion on the basis of gender. *Earwood*, 539 F.2d. at 1351; *Knott*, 527 F.2d at 1251-52; *Willingham*, 507 F.2d at 1091; *Baker*, 507 F.2d at 896-97;

Fagan, 481 F.2d at 1121. One decision almost goes so far as suggesting that Title VII would protect only women (and not men) denied a job or promotion on the basis of gender. *Fagan*, 481 F.2d at 1121.

The decisions in the grooming cases crave out not just a defense to a Title VII claim but an outright exemption from Title VII. According to these decisions, if a practice does not significantly deny a person an opportunity for a job or a promotion on the basis of gender, it is simply not covered by Title VII. It is outside the statutory goals of Title VII. *Earwood*, 539 F.2d. at 1351; *Knott*, 527 F.2d at 1251-52; *Willingham*, 507 F.2d at 1091; *Baker*, 507 F.2d at 896-97; *Fagan*, 481 F.2d at 1121. In other words, under the reasoning of these decisions, terminations on the basis of gender may not be covered by Title VII. Sexual harassment may not be covered by Title VII. The unequal distribution of the costs of benefits, or the unequal distribution of benefits would not be covered by Title VII. Sexual stereotyping, under one particularly significant decision, would not violate Title VII. *See Willingham*, 507 F.2d at 1092.

Part and parcel with this reasoning was the belief that the employment practice being challenged had to have a significant, or more than negligible (or *de minimis*), effect on employment or promotion opportunities. If the practice did not have a significant effect, the practice would fall into the exemption. Hair length and other grooming standards[1] were believed to

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[1] Dress code cases were once analyzed in the same way as grooming cases. Today, however, dress codes are more likely to violate Title VII. *See Bundy v. Jackson*, 641 F.2d 934, 205 U.S.App.D.C. 444 (D.C.Cir. 1981); *Carroll v. Talman Federal Sav. & Loan Assn. of Chicago*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929, 100 S.Ct. 1316, 63 L.Ed.2d 762 (1980); *E.E.O.C. v. Sage Realty Corp.*, 507 F.Supp. 599 (S.D.N.Y. 1981); *Marantette v. Michigan Host, Inc.*, 506 F. Supp. 909 (E.D.Mich. 1980). Similarly, no-beard policies were once analyzed like grooming cases. Today, they too are

have at most only a negligible or *de minimis* effect on employment opportunities. Thus, they were deemed not to be covered by Title VII. *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401-02 (6th Cir. 1976); *Knott*, 527 F.2d at 1252.

From this exemption, however, these courts appeared to crave out an exception. Even these courts appeared uncomfortable with sanctioning all explicitly gender-based conduct not related to hiring or promotion, or not having a significant effect on hiring or promotion. Thus, if a practice did not go directly to hiring or promotion decisions, or if the practice did not have a significant effect on employment opportunities, it would nonetheless be considered to be a violation of Title VII if the conduct was based on an immutable characteristic closely enough associated with a person's sex, or was based specifically on a person's gender. However, if gender-based conduct could be related to a characteristic, like hair length, which was not immutable, or if it could be related to something else which was apparently gender-neutral, the gender-based conduct would be considered to be both gender neutral and nondiscriminatory. *Willingham*, 507 F.2d at 1092. This exception to an exemption was apparently created in order to reconcile the grooming cases to this Court's decision in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496 (1971).

Phillips concerned a hiring policy which precluded the hiring of women with school age children. Despite the restriction, most of the people in the applicable positions were women. *Phillips*, 400 U.S. at 543, 91 S.Ct. at 497. Thus, it could have been argued that the restriction had no significant

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more likely to violate Title VII. *See E.E.O.C. v. Trailways, Inc.*, 530 F.Supp. 54 (D.Colo. 1981); *Isaac v. Butler's Shoe Corp.*, 511 F.Supp. 108 (N.D.Ga. 1980). *See also Tamimi v. Howard Johnson Co.*, 807 F.2d 1550 (11th Cir. 1987) (Makeup policy found to have been discriminatorily applied to pregnant women).

effect on the hiring opportunities available to women. Nonetheless, the Court, in a per curiam decision, found the policy to be a violation of Title VII. *Phillips*, 400 U.S. at 544, 91 S.Ct. at 497-98.

As can easily be seen, current law would not support the positions taken in the grooming cases. As this Court has clearly stated, under Title VII, Congress intended to reach all types of employment practices based on gender. *Harris v. Forklift Systems, Inc.*, -- U.S. -- , 114 S.Ct. 367, 370 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40, 109 S.Ct. 1775, 1785, 104 L.Ed.2d 268(1989); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49(1986); *Hishon v. King & Spalding*, 467 U.S. 69, 77, 104 S.Ct. 2229, 2234, 81 L.Ed.2d 59 (1984). Further, it protects both men and women, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681-82, 103 S.Ct. 2622, 2630, 77 L.Ed.2d 89 (1983), and various sorts of practices including sexual harassment, *Harris*, 114 S.Ct. 367; *Meritor Savings Bank*, 477 U.S. 57, 106 S.Ct. 2399, the cost of benefits, *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), and the distribution of benefits, *Newport News*, 462 U.S. 669, 103 S.Ct. 2622. It prohibits all forms of sexual stereotyping, *Price Waterhouse*, 490 U.S. at 250-51, 109 S.Ct. at 1790-91; *Manhart*, 435 U.S. at 707, 98 S.Ct. at 1375; *Rodriguez v. Board of Ed. of Eastchester U. Free Sch. Dist.*, 620 F.2d 363, 366 (2d Cir. 1980), and it covers all terms or conditions of employment, whether significant or not. *See Harris*, 114 S.Ct. at 371 (Plaintiff need not show psychological injury to prevail on a sexual harassment claim); *Rodriguez*, 620 F.2d at 364 & 366 (Plaintiff need not show economic harm to prevail on a claim of gender-based transfer). It provides for no exemption for practices that are tied to allegedly neutral factors. *Autoworkers v. Johnson Controls, Inc.*, 499 U.S. 187, 197-99, 111 S.Ct. 1196, 1203, 113 L.Ed.2d 158 (1991); *Newport News*, 462 U.S. 669, 103 S.Ct. 2622. In short, the reasoning of the

cases cited by the Second Circuit is no longer good law.

CONCLUSION

This petition seeks the review of a Second Circuit decision which conflicts in important ways with the decisions of this Court under Title VII. The Second Circuit has departed so radically from established law that this Court must exercise its supervisory powers. For this reason, the petitioner asks that this Court grant his request for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Date: March 10, 1997

Respectfully submitted,
RUI TAVORA
Petitioner Pro Se
86-05 102d Road
Ozone Park, NY 11416
(718) 641-7843

95011

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of December, one thousand nine hundred and ninety-six.

PRESENT: HON. Ralph K. Winter
HON. John M. Walker, Jr.
Circuit Judges
HON. Leonard D. Wexler
District Judge

Docket No: 96-7613

RUI TAVORA,

Plaintiff-Appellant,

v.

NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

Appeal from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk
By:

_____
Arthur M. Heller
Administrative Attorney

* The Honorable Leonard D. Wexler of the United States District Court for the Eastern District of New York, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 620---August Term, 1996
(Argued: December 6, 1996
Decided: December 12, 1996)

Docket No. 96-7613

RUI TAVORA,

Plaintiff-Appellant,

--v.--

NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

Before:
WINTER and WALKER, *Circuit Judges,*
and WEXLER, *District Judge.* *

---

* The Honorable Leonard D. Wexler of the United States District Court for the Eastern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York (John E.

Sprizzo, *Judge*) dismissing Rui Tavora's claim. Tavora contends that the New York Mercantile Exchange violated his rights under Title VII when it dismissed him for failing to comply with its policy requiring short hair for male employees. We believe Tavora's claim is outside the scope of Title VII protection. We therefore affirm.

DAVID M. LIRA, Garden City, New York, *for Plaintiff-Appellant.*

MARTIN I. KAMINSKY, Pollack & Kaminsky (Justin Y.K. Chu, of counsel), New York, New York, *for Defendant-Appellee.*

PER CURIAM:

Rui Tavora appeals from Judge Sprizzo's order dismissing his complaint for failure to state a claim for relief. Tavora was terminated by the New York Mercantile Exchange from his position as reporter of trades when he failed to comply with its policy requiring male employees to have short hair. Tavora contends that this policy, limiting hair length for male employees but imposing no similar restriction on female employees, discriminates against male employees on the basis of gender in violation of Title VII, 42 U.S.C. § 2000e, et seq. We disagree.

In *Longo v. Carlisle DeCoppet & Co.*, we held that "requiring short hair on men and not on women does not violate Title VII," 537 F.2d 685, 685 (2d Cir. 1976); *see also Seitz v. O'Connor*, 1995 WL 745012, *2 (E.D.N.Y. Nov. 30, 1995). Every court of appeals that has considered this issue has agreed. *See Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Earwood v. Continental*

Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); *Knott v. Missouri Pacific Railway Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Willingham v. Macon Telegraph Publ. Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975); *Baker v. California Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973).

The rationale of those decisions has generally been either that hair length policies are not within the statutory goal of equal employment, *see Willingham*, 507 F.2d at 1091 ("grooming codes or length of hair is related more closely to the employer's choice of how to run a business than to equality of employment opportunity"), or that such employment policies have only a de minimis effect, *see Dodge*, 488 F.2d at 1337 ("Title VII was never intended to encompass sexual classifications having only an insignificant effect on employment opportunities.")

Tavora argues that this precedent is no longer good law in light of more recent Supreme Court decisions, in particular *Newport News Shipping and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), and *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). *Newport News* found discriminatory a health benefits policy that provided lesser benefits for pregnancy-related services to male employees than it provided to female employees. 462 U.S. at 676. The Court stated, "[s]uch a practice would not pass the simple test of Title VII discrimination that we enunciated in *Los Angeles Dept. of Water & Power v. Manhart*, for it would treat a male employee with dependents 'in a manner which but for that person's sex would be different.'" *Id.* at 682-83 (citing *Manhart*, 435 U.S. at 711). *Manhart* held discriminatory a pension policy requiring female employees to make larger contributions than males because women's longevity was

statistically greater. The Court stated, "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." 435 U.S. at 707.

Tavora contends that the "but for" test enunciated in *Manhart* and *Newport News*, combined with the Supreme Court's broad language aimed at eradicating gender-based discrimination, overrules the courts of appeals cases cited above. He argues that Title VII applies to *any* employment policy with *any* difference between men and women, no matter how trivial. We disagree with Tavora's reading of *Manhart* and *Newport News*. We believe that Tavora's argument fails to consider the factual context of those decisions, namely employment policies resulting in significantly different levels of pension and health benefits for males and females. Those decisions do not, therefore, undercut the rationales of the hair-cutting cases cited above, *see Devine v. Lonschein*, 621 F.Supp. 894, 896-97 (S.D.N.Y. 1985) (citing *Longo*, 537 F.2d 685), *aff'd*, 800 F.2d 1127 (2d Cir. 1986); *Seitz*, 1995 WL 735012; *Rogers v. American Airlines*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981); *see contra Rourke v. New York State Correctional Serv.*, 915 F. Supp. 525 (N.D.N.Y. 1995) (overruling hair length regulation on religious grounds), and we must continue to follow them.

We therefore affirm.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

New York District Office
7 World Trade Center, 18th Floor
New York, NY 10048-1102
Phone: (212) 748-8500
TDD: (212) 748-8399
General FAX: (212) 748-8464
Legal FAX: (212) 748-8465

Charge No. 160-95-2273

Mr. Rui Tavora — Charging Party
86-05 102nd Road
Ozone Park, NY 11416

New York Mercantile Exchange — Respondent
Four World Trade Center
New York, NY 11416

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

All requirements for coverage have been met. Charging Party, a male, worked for Respondent as a Reporter. He claims that Respondent ordered him to cut his hair and when he refused, Respondent terminated his employment, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I have determined that the evidence does not establish a violation of the statute.

This determination and dismissal concludes the processing of this charge. This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission. Following this dismissal, the Charging Party may only pursue this matter by filing suit against the Respondent named in the charge within ninety (90) days of receipt of this letter. Otherwise, the Charging Party's right to sue will be lost.

You are reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who cooperate in Commission investigations is also prohibited. These protections apply regardless of the Commission's determination on the merits of the charge.

On Behalf of the Commission

Jul 19, 1995 _____

Date

Spencer H. Lewis, Jr.
District Director

Enclosure: (1)
Information Sheet on Filing Suit in Federal Court

UNITED STATES DISTRICT COURT:
SOUTHERN DISTRICT OF NEW YORK
----------X

RUI TAVORA,

Plaintiff, **COMPLAINT**

-against- Case No.

NEW YORK MERCANTILE EXCHANGE, Plaintiff demands a trial by JURY

Defendant.

----------X

The plaintiff alleges, by counsel, as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

2. This Court has pendent jurisdiction over the plaintiff's claims based on the New York State Human Rights Law, Executive Law § 290, et seq.

3. Pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq, on or about May 23, 1995, the plaintiff filed a complaint with the United States Equal Employment Opportunity Commission.

4. On or about August 18, 1995, the United States Equal Employment Opportunity Commission issued to

the plaintiff a Notice of Right to Sue pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

5. Venue is proper in this District under 28 U.S.C. § 1391.

6. The plaintiff is, and, at all times mentioned in this complaint, was a resident of the County of Queens, State of New York.

7. Upon information and belief, defendant is, and, at all times mentioned in this complaint, was a corporation authorized to do business in the State of New York, and maintains and maintained a place of business in the County of New York, State of New York.

FACTS

8. The plaintiff was employed by defendant as Reporter.

9. In such position, the plaintiff reported trades made on the floor of the New York Commodities Exchange.

10. On or about February 20, 1995, the defendant terminated the employment of the plaintiff.

11. The plaintiff is qualified to perform the duties of the position.

12. The plaintiff is male.

13. The defendant demanded that the plaintiff cut his hair.

14. Women in the same or similar positions as the plaintiff with hair of a length comparable to that of the plaintiff were not required to cut their hair.

15. When the plaintiff failed and refused to cut his hair, the defendant terminated the plaintiff's employment.

16. The actions undertaken by the defendant were undertaken because the plaintiff is male.

FIRST CAUSE OF ACTION FOR DISCRIMINATION ON THE BASIS OF GENDER IN A TERM OR CONDITION OF EMPLOYMENT

17. The plaintiff repeats each allegation contained in paragraphs 1 through 16 as though fully set forth in this paragraph.

18. The conduct of the defendant in requiring the plaintiff to cut his hair constitutes an unlawful discriminatory practice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq, and the New York State Human Rights Law, Executive Law § 290, et seq.

SECOND CAUSE OF ACTION FOR DISCRIMINATION ON THE BASIS OF GENDER FOR TERMINATION OF EMPLOYMENT

19. The plaintiff repeats each allegation contained in paragraphs 1 through 18 as though fully set forth in this paragraph.

20. The conduct of the defendant in termination the plaintiff's employment because the plaintiff failed to cut his hair constitutes an unlawful discriminatory practice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq, and the New York State Human Rights Law, Executive Law § 290, et seq.

WHEREFORE, the plaintiff asks for a judgment against the defendant for the following relief:

a. A declaration that defendant has violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq, and the New York State Human Rights Law, Executive Law § 290, et seq;

b. An injunctive directing defendant to cease enforcing its grooming standards in a discriminatory manner;

c. Reinstatement with backpay;

d. Compensatory damages, including damages for loss of earnings, emotional distress, mental anguish, and other special damages;

e. Punitive damages;

f. Attorneys' fees and costs; and

g. Such other and further relief as may be just under the circumstances of this case.

Dated: October 9, 1995

DAVID M. LIRA
Attorney for Plaintiff
585 Stewart Avenue
Suite 314
Garden City, NY 11530-4701
(516) 222-2777
DL3873

STATE OF NEW YORK)
ss..
COUNTY OF QUEENS)

RUI TAVORA, being duly sworn, states that he is a plaintiff in the above entitled action and that the foregoing complaint is true, except as to matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

_____

RUI TAVORA

Sworn to before me this 13
day of October, 1995

_____

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

RUI TAVORA, :

Plaintiff, :

95 Civ. 9021 (JES)

-against- :

NEW YORK MERCANTILE EXCHANGE, : **NOTICE OF MOTION TO DISMISS COMPLAINT**

Defendant.:

----------X

Sirs:

PLEASE TAKE NOTICE that, upon the Complaint and the prior proceedings herein, defendant will move this Court, before Honorable John E. Sprizzo, on April 12, 1995 at 1:30 p.m., at the United Stated Courthouse, 40 Centre Street, Foley Square, New York, New York 10007, for an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing this action on the ground that the Complaint fails to state a claim upon which relief can be granted and is legally insufficient, and granting defendant such other and further relief as the Court may deem just and proper. The grounds for the motion are detailed in the accompanying brief in support of the motion.

Dated: January 29, 1996
New York, New York

Yours etc.,

Pollack & Kaminsky

by:

Martin I. Kaminsky (MK3033)
114 West 47th Street
New York, New York 10036
(212) 575-4700

Attorneys for Defendant
New York Mercantile Exchange

To: David R. Lira, Esq.
Attorney for Plaintiff
585 Stewart Avenue, Suite 314
Garden City, New York 11530

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

RUI TAVORA,

Plaintiff,

v. 95 Civ. 9021 (JES)

NEW YORK MERCANTILE EXCHANGE,

Defendant.

----------X

New York, N.Y.
April 12, 1996

Before:

HON. JOHN E. SPRIZZO,

District Judge

APPEARANCES

DAVID M. LIRA,
Attorney for Plaintiff

POLLACK & KAMINSKY
Attorneys for Defendant
BY: MARTIN KAMINSKY
JUSTIN CHU

MR. KAMINSKY: Martin Kaminsky and Justin Chu, of Pollack & Kaminsky, for New York Mercantile. We are moving to dismiss the complaint on the ground that NYMEX's policy on hair grooming does not fall within the anti-discrimination laws and does not constitute unlawful discrimination under either federal law or state law. As your Honor is aware, all of the cases that have confronted this issue have held --

THE COURT: Their argument is that that is all old law and I shouldn't follow it. I don't think it is for me to make that decision.

MR. KAMINSKY: I hope that your Honor got our request to file a reply brief. We filed a short reply brief. In it we filed a case decided by Judge Johnson in the Eastern District this past year.

THE COURT: But he has the same commission that I have.

MR. KAMINSKY: Well, I understand, yes.

THE COURT: The Second Circuit hasn't ruled on it?

MR. KAMINSKY: That's correct. But other district judges have and other circuit courts have cited these cases as still good law. The plaintiff's argument is that the *Newport News* case in particular and the *Manhart* case in the Supreme Court signal a total change in the law: that in fact any discrimination whatever between males and females in any form, regardless of what it is, is illegal. The cases since then, as you pointed out --

THE COURT: I agree with the Second Circuit when they say that they accept the result in those cases but not the reasoning. Quite frankly, the distinction between what is inherently female and what is mutable escapes me. Obviously, when you make a policy which is facially specific as to gender, you are dealing with something that is inherent in the person, not something mutable.

What I do find persuasive in those cases is the argument that not every kind of discrimination based upon gender is important enough to be the subject of Title VII remedial action. That is where I come out. I think, with all due respect to you, until the Second Circuit has decided otherwise, as old as the Second Circuit case is, it is up to them to change it. I have to follow the law in this circuit. I don't have a sufficient basis to think that the Second Circuit is going to rule differently. If they are, you can take this case up and find out. I am constrained by precedent here, and I am required to follow the Second Circuit decision -- which I agree with, by the way.

On the facts of this case, I don't think that every gender-based discrimination has sufficient impact upon the employment context to be properly addressable under the statute. That is the underlying reason for those cases, that some things are just too trivial. That is what those cases seem to be saying. Telling men to cut their hair short or women to keep it long seems to be the minutiae of office regulation. It doesn't seem to rise to the level of Title VII remedial action. That is what the Second Circuit meant when it said that it agreed with the majority of cases on this issue. I don't agree with all the reasoning in those cases either, but to the extent that they accept a policy that trivializes the statute by having all gender-based discriminations wind up in the federal court, I think it is just not consistent with where the law is or where I think it is going. If anything, the trend in the Supreme Court is to require less micromanagement. Therefore, I have to dismiss the complaint.

MR. KAMINSKY: We obviously agree with you, so I will yield to Mr. Lira.

MR. LIRA: I just want to make this one point, your Honor, however. The idea that this type of issue is unimportant --

THE COURT: Not important enough to raise the remedial purposes that the statute was designed for. This is a statute that deals with real impact upon employment possibilities for females in place of males, or *vice versa*. When you talk about pension funds, when you talk about pregnancy leave, you are talking about matters that strike at the very heart of the employment situation. When you talk about regulating what length of hair men wear, you are getting into a micromanagement which I don't think Congress intended.

MR. LIRA: I disagree, your Honor. I think that what it comes down to is, no, there is no blanket rule in Title VII or that can be read from Title VII that says that an employer can impose grooming standards. I would not support a position like that. The problem is when the standard becomes gender conscious. That is what the problem is here. Based on Supreme Court precedent, based on those three cases I rely on very heavily, it doesn't matter whether --

THE COURT: But they all deal with a much more significant impact based upon gender than the case that you have. All I am telling you is that you have a very heavy burden in persuading a District Court judge that it should not follow a Second Circuit opinion on the theory that the Supreme Court has changed the law.

MR. LIRA: I agree with you.

THE COURT: That is an argument that you can make in the right place: upstairs. They have the power to overrule their own precedents; I don't. I don't think you have shown me enough in the way of changing the law to lead me to take the rather large step of anticipating a reversal of a 20-year-old precedent by the Circuit Court.

MR. LIRA: One other point, your Honor.

THE COURT: Therefore, I think you are making your argument in the wrong place. You have to make it upstairs.

MR. LIRA: When I took on this case, it appeared to me that I would have to end up in the Second Circuit.

THE COURT: So I will get you there quickly.

MR. LIRA: But I still have an obligation to represent my client. There is one other point that I do want to make. Within three days of the decision that defendant cites, *Seitz v. O'Connor*, there was also a decision in the Northern District that also had to do with grooming, another grooming case, and that case is *Rourke v. New York State Department of Corrections*.

THE COURT: That case was a religion case.

MR. LIRA: Yes, ultimately it was decided on religion.

THE COURT: That was the point of it. The prison regulation was an interference with the exercise of religion, and the state did not show a compelling state interest. That case has nothing to do with this case.

MR. LIRA: That is a Third Department decision. But also the Northern District decided that it violated Title VII.

THE COURT: Who was the judge in the Northern District?

MR. LIRA: I haven't been able to get a copy of the decision.

THE COURT: Probably a good friend of mine, with all due respect.

MR. LIRA: I can give you the citation of the index number to the case. I have not been able to get a copy of the decision.

THE COURT: What you throw out as *dicta* in an opinion is one thing. Here I have no case to cite to overrule the Second Circuit, and I don't think I can do that based on the record that you have made. If they want to overrule themselves, they can. I am not going to overrule them. I think you are making your arguments in the wrong place.

MR. LIRA: Thank you.

THE COURT: I will enter an order. You can appeal it. If they change the law, it is all right with me. I have to follow the law that they hand down. They make the rules. Have a good day.

- - -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

RUI TAVORA,

Plaintiff,

- against - 95 Civ. 9021 (JES)

NEW YORK MERCANTILE EXCHANGE,

ORDER

Defendant.
----------X

The plaintiff Rui Tavora having filed the instant Title VII action after defendant New York Mercantile Exchange terminated plaintiff's employment for failure to comply with defendant's short hair male grooming policy, and plaintiff having asserted that defendant's policy with requires short hairstyles for men but not for women constitutes gender discrimination in violation of his rights under federal and state law, and pursuant to Federal Rule of Civil Procedure 12 (b)(6), defendant having filed a motion to dismiss the complaint on the ground that plaintiff has failed to state a claim, and all counsel in the above-captioned action having appeared before this Court for Oral Argument on April 12, 1996, and the Court having considered all matters raised, it is

ORDERED that for the reasons set forth on the Record at Oral Argument, defendant's motion to dismiss shall be and hereby is granted, see Longo v. Carlisle DeCoppet & Co., 536 F.2d 685 (2d Cir. 1976), and it is

ORDERED that the Clerk of Court shall enter judgment accordingly and close the above-captioned action.

Dated: New York, New York

April 15, 1996

John E. Sprizzo
United States District Judge

U.S. DISTRICT COURT
FILED
APR 19 1996
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RUI TAVORA,

Plaintiff,

95 CIVIL 9021 (JES)

- against -

JUDGMENT

NEW YORK MERCANTILE EXCHANGE,

Defendant.

----------X

Defendant having moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the said motion having come before the Honorable John E. Sprizzo, United States District Judge, for Oral Argument on April 12, 1996, and the Court thereafter on April 15, 1996, having rendered its Order, granting Defendant's motion to dismiss the Complaint for the reasons set forth at Oral Argument on April 12, 1996, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons set forth on the Record at Oral Argument, Defendant's motion to dismiss the Complaint be and it is hereby granted, see Longo v. Carlisle DeCoppet & Co., 536 F.2d 685 (2d Cir. 1976); accordingly, the Complaint is dismissed and the above-entitled action is closed.

DATED: NEW YORK, NEW YORK
APRIL 19, 1996

JAMES M. PARKISON

Clerk of Court

By:

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 4/19/96

UNITED STATES DISTRICT COURT for the
SOUTHERN DISTRICT OF NEW YORK

RUI TAVORA,

NOTICE OF APPEAL

Plaintiff,

Case No. 95 Civ. 9021

-against-

Judge John E. Sprizzo

NEW YORK MERCANTILE EXCHANGE,

Defendant.

Notice is hereby given that the Plaintiff in the above named matter, hereby appeals to the United States Court of Appeals for the SECOND CIRCUIT from a Judgment entered in the above entitled action on April 19, 1996, which dismissed the complaint in this matter for failure to state a cause of action for which relief may be granted.

Dated: May 4, 1996

DAVID M. LIRA
Attorney for Plaintiff
585 Stewart Avenue
Suite 314
Garden City, NY 11530
(516) 222-2777

(2)

No. 96-1475

Supreme Court, U.S.
FILED
APR 16 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RUI TAVORA,

Petitioner,

—against—

NEW YORK MERCANTILE EXCHANGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARTIN I. KAMINSKY
Counsel of Record

JUSTIN Y.K. CHU
Pollack & Kaminsky
114 West 47th Street
New York, New York 10036
(212) 575-4700

Attorneys for Respondent New York Merchantile Exchange

Of Counsel:

RONALD S. OPPENHEIMER
Executive Vice-President
and General Counsel of
New York Merchantile Exchange

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Respondent New York Mercantile Exchange ["NYMEX"] respectfully submits that a writ of certiorari should not issue in this case. The decision below is not in conflict with the decisions of this Court. There is no conflict between the Circuits; indeed, all seven Circuits that have ruled on the issue presented have reached the same result. The decision below also comports with common sense; and it would be inappropriate and imprudent for the Court to legislate the new absolutist rule proposed by Petitioner.

STATEMENT OF THE CASE

Petitioner's brief correctly states the factual and procedural background of the case: *viz*, that he sues to overturn the adverse decisions against him (by the United States Court of Appeals for the Second Circuit, the United States District Court for the Southern District of New York and the Equal Employment Opportunity Commission) that NYMEX did not violate Title VII when it discharged Petitioner for failing to comply with NYMEX's policy regarding the permissible length of hair of its employees [A.3-6, 7-8 and 16-21]. The proffered basis for Petitioner's claim is that female employees of NYMEX are not required to have the same hair length as male employees [A. 11], which he says renders NYMEX's policy a violation of Title VII.

Petitioner does not contend that NYMEX instituted its hair-length policy in order to apply it against him personally, or that NYMEX enforced the policy against only him or differently as to other male employees [cf. A. 10-11]. Nor does Petitioner allege that NYMEX had any discriminatory or other wrongful intention in firing him, or that its policy is unreasonable—*i.e.*, except that it is allegedly discriminatory [*id.*].

I.

UNANIMOUS AUTHORITY HOLDS THAT HAIR LENGTH POLICIES ARE NOT WITHIN TITLE VII

This case presents a narrow issue: *viz*, whether an employer can prescribe different acceptable hair lengths for its male employees than those for female employees. Every court which has previously addressed this issue (including the Court of Appeals and the District Court in this case), both before and after the decisions of this Court cited by Petitioner, has answered "yes". *Longo* v. *Carlisle DeCoppet & Co.*, 537 F. 2d 685 (2d Cir. 1976) ("requiring short hair on men and not on women does not violate Title VII"); *Barker* v. *Taft Broadcast Co.*, 549 F.2d 400 (6th Cir. 1977); *Earwood* v. *Continental Southeastern Lines*, 539 F.2d 1349 (4th Cir. 1976); *Knott* v. *Missouri Pacific RR*, 527 F.2d 1249 (8th Cir. 1975); *Baker* v. *California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046, 95 S. Ct. 2664, 45 L. Ed. 2d 699 (1976); *Willingham v. Macon Telegraph Pub. Co.*, 507 F. 2d 1084, 1091 (5th Cir. 1975) (en banc); *Fagan* v. *National Cash Register Co.*, 481 F.2d 1115, 1125 (D.C.Cir. 1973); *Seitz* v. *O'Connor*, 1995 WL 745012, *2 (E.D.N.Y. 1995). See also: *Rogers* v. *American Airlines, Inc.*, 527 F.Supp. 229, 231 (S.D.N.Y. 1981) ("even if the grooming policy imposed different standards for men and women, . . . it would not violate Title VII"); *Bertulli* v. *First Nat. Stores*, 20 Fair Empl. Prac. Cases (BNA) 1527 (D.Mass 1979); Mack, *Employment Discrimination Law* §5.41 at 388 (1988).[1]

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[1] Indeed, settled authority also holds that hair grooming policies of other types also do not violate the law. Thus, in *Rogers*, *supra* (527 F. Supp. at 231), the Court held that a hair grooming policy which prohibited females from wearing an all-braided hair style was not discriminatory, either as to women or as to Afro-American persons who wish to wear their hair in the "cornrow" style. Accord: *McBride* v. *Lawstaf, Inc.*, U.S. Dist. LEXIS 16190, *6-7, 1996 U.S. Dist. LEXIS 16188 (N.D. Ga.

Some of these decisions have reasoned that such a difference is not discrimination within the ambit intended by Congress for Title VII because it is too insignificant in nature and effect. Some have reasoned or added that such a policy does not offend Title VII because it addresses differences between the sexes that are not immutable or tied to immutable aspects of gender such as different biological characteristics. Several have reasoned in this regard, or added, that such a policy is not unreasonable and is so easily complied with that it would offend common sense to rule the policy illegal, particularly on an across-the-board basis. All are correct, as the Court of Appeals in this case concluded [A. 5].

The Court (we respectfully submit) should decline Petitioner's invitation to go beyond the narrow length-of-hair issue presented here and to wade into the quicksand of attempting to decree an absolute rule for every conceivable employer-employee policy. There is no need or warrant for such dangerous judicial legislation, particularly in the context of this case.[2]

Petitioner himself asks this Court for a "common sense" approach to this issue, correctly cautioning that "common sense should never be left at the door" [Petition at 11]. Yet,

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1996) ("grooming policy prohibiting a braided hair style is not 'unlawful employment practice' as defined by 42 U.S.C. § 2000e-2").

[2] If such a rule is to be decreed (and NYMEX respectfully contends it should not), it should be decreed by Congress, not the courts. Petitioner's suggestion that society's mores and attitudes have changed during the past ten or fifteen years is a sociological argument which should be addressed to the legislature. Contrary to his contention, those courts which have outlawed other dress or appearance differences in recent years have not based their decisions on such a consideration, but rather on the undeniably offensive and substantively discriminatory nature of the policies which were at issue in those cases, e.g. making women wear sexually provocative attire, *etc.* Indeed, those courts cautioned against the absolutist rule that Petitioner seeks, and concentrated instead on the particular employment policies before them. See, e.g., *Batson* v. *Powell*, 912 F. Supp. 565, 572 (D.D.C. 1996).

the automatic rule which Petitioner proposes would do just that. The courts cannot possibly envision every conceivable employment situation in which differences between the sexes may become an issue; and our common sense should tell us not to try. For example, does it really discriminate, and (if so) in a manner we wish to outlaw (with serious monetary penalties), for an employer to provide different lavatory facilities for men and women? For an employer to prohibit men from wearing lipstick or mini-skirts? To allow a beach club to require different bathing suits for male and female lifeguards?[3] *Etc.*, *etc.* Should the courts pre-decide all such potential fact-specific issues on a global basis?

This Court has not decreed an absolute rule; and the lower court decisions since the decisions of this Court which Petitioner cites so recognize. Petitioner would have the Court take out of context parts of sentences or other remarks in those opinions to support his argument that the Court did establish an absolute rule in them. NYMEX does not believe that they even say what Petitioner contends; but, such statements must be read as part of the full discussion and the factual context in which they were made. See, e.g., *Landgraf* v. *USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed. 2d 229, 252 (1994); *Bramwell* v. *U.S. Fidelity & G.Co.*, 269 U.S. 483, 489, 46 S.Ct. 176, 70 L.Ed. 368 (1925); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 264, 399, 5 L.Ed. 257 (1821); *U.S.* v. *Brown*, 79 F. 3d 1550, 1556 n.11 (11th Cir. 1996); *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87, 92-93 (2d Cir. 1993), *cert. denied*, 510 U.S. 1091, 114 S.Ct. 920, 127 L.Ed. 2d 214 (1994).

Each of the decisions cited by Petitioner involved an alleged discrimination of consequence, whose effect was to treat one sex in an unequal manner because of the biological differences between men and women. That is the rationale of

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[3] See, e.g., *Dodge* v. *Giant Food, Inc.*, 488 F.2d 1333, 1336-37 (D.C. Cir. 1973).

the "immutable" characteristics distinction fixed by some courts, and of the conclusion that some differences simply do not fall within the statute. Whether the words have expressed the logic perfectly, or frankly can do so, the common sense of the result and of an approach which evaluates each different policy on an individual basis is clear.

Petitioner has also incorrectly exaggerated the effect of the other hair-length cases, excessively contending that, "under the reasoning of these decisions, terminations on the basis of gender may not be covered by Title VII" and "sexual harassment may not be covered" [Petition at 13]. Those decisions have not had any such effect. Rather, true gender discrimination and sexual harassment have been repeatedly and unhesitatingly outlawed since and notwithstanding the hair-length decisions. Indeed, no case of which we are aware has suggested that the hair-length decisions have such a meaning or have had such an effect.[4]

II.

THE DECISION BELOW IS NOT INCONSISTENT WITH CURRENT DECISIONS OF THIS COURT

Petitioner incorrectly contends that decisions of this Court since the early hair-length cases (i.e., the mid-1970's) have changed the law, creating an absolutist rule that an employer can make no distinction between and men and women which has any effect whatever on an employee's rights and benefits. NYMEX respectfully submits that Petitioner is in error, and

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[4] *Tamini* v. *Howard Johnson Co.*, 807 F.2d 1550 (11th Cir. 1987), cited by Petitioner, does not so state and, in any event, is distinguishable. The court there specifically declined to rule that any policy requiring female employees to wear make-up is or would be illegal (see p. 1554); rather, the policy there was found violative because it was "implemented with plaintiff in mind" (*id.*), and "for pretextual purposes. . . directed at plaintiff" (p. 1555). Admittedly, no such situation is presented here.

(as the Court of Appeals at bar correctly concluded) has "fail[ed] to consider the factual context" and actual holdings of those cases [A.6].

As noted above, this Court and the Courts of Appeal have frequently cautioned that it is improper to simply lift a sentence out of a judicial opinion and suggest that it is declarative of an absolutist rule of law. As Chief Justice Marshall explained, long ago, in *Cohens*, *supra* (19 U.S. at 399):

> "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. . . ."

Accord: *Landgraf*, *supra* (128 L. Ed. at 252); *Bramwell*, *supra* (269 U.S. at 489); *Brown*, *supra* (79 F. 3d at 1556 n. 11); *In re Grand Jury*, *supra* (1 F. 3d at 92-93).

Thus, while it is true that language in some of this Court's decisions states that Title VII covers "the entire spectrum of disparate treatment of men and women" by employers and outlaws employment policies based only on gender [cf. Petition at 6 and 9], those pronouncements must be read in context, and the factual circumstances in which they were made can not be ignored.

Petitioner incorrectly contends [Petition at 11] that the decisions at bar and the unanimous line of authority regarding hair-length "do not reflect or take into account the changes in the law since the *Gilbert* decision", i.e., *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L. Ed. 2d. 343 (1976). Petitioner traces that supposed change in the law to *Newport News Shipbuilding & Dry Dock Co.*, v. *EEOC*, 462 U.S. 669, 681-82, 103 S.Ct. 2622, 77 L. Ed. 2d 89 (1983), which he says signaled an adoption by this Court of the absolutist rule he proposes. More specifically, Petitioner

relies upon a sentence in *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L. Ed. 2d 657 (1978), to argue that Title XII outlaws any employment policy which includes "treatment of a person in a manner which but for that person's sex would be different" [Petition at 9].

The Court of Appeals at bar correctly rejected that argument, since it misinterprets *Newport News*, *Manhart* and the other cases cited by Petitioner [A.5-6].

Newport News did not state that any employment policy which draws *any* difference between men and women, regardless of its nature, violates Title VII. Rather, the Court directed itself to the specific policy at issue there, i.e., whether an employer could provide different pregnancy health care coverage for female employees as opposed to the spouses of male employees. The Court found that such direct and serious discrimination between male and female employees violates the Pregnancy Discrimination Act, which had specifically overruled both the Court's prior decision in *Gilbert*, 429 U.S. 125, as to pregnancy policies and the "reasoning" of that decision (see 462 U.S. at 684).

The "reasoning" to which the Court referred in *Newport News*, however, was *not* (as Petitioner contends) "analogous to the reasoning" of the hair-length cases [cf. Petition at 7]. Rather, *Gilbert* had reasoned that "an exclusion based on pregnancy is not a gender-based discrimination at all" (429 U.S. at 136), and that pregnancy was not within Title VII because it supposedly is not a "disease or disability" (*id.*). Congress disagreed, and determined (in enacting the Pregnancy Discrimination Act) that pregnancy *is* a condition as to which Title VII should apply and does apply. If there is to be such a broad-sweeping change in the law as to the issue presented here (which NYMEX respectfully submits should not occur), it too should be made by Congress, not the courts.

Newport News did not say, as Petitioner suggests, that there can be no difference whatever in the treatment of men and

women; and the cases since *Newport News* have not construed it as so decreeing. Indeed, those cases hold the opposite, and continue to endorse the reasoning of the hair-length cases. Thus, the court explained in *Craft* v. *Metromedia, Inc.*, 572 F.Supp. 868, 877 (W.D.Mo. 1983), *aff'd on relevant ground and mod. on other grounds*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed 2d 592 (1986):

> "To the extent that plaintiff might argue that Title VII absolutely prohibits an employer from imposing reasonable but different standards of appearance for males and females, such a position must be rejected as contrary to the overwhelming weight of authority. Title VII 'was never intended to interfere with the promulgation and enforcement of personal appearance regulations by private employers' [citations omitted]. 'A private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees, and such does not constitute an unfair employment practice . . .' [citations omitted]".

Accord: *Arnett* v. *Aspin*, 846 F.Supp. 1234, 1239-40 (E.D.Pa. 1994) ("employment policies which prohibit long hair on men but not on women . . . have been upheld against Title VII challenges"); *McBride, supra* (1996 U.S. Dist. LEXIS 16190 at *6-7) (same); *Cairo* v. *OH Material Corp.*, 710 F.Supp. 1069, 1071(M.D.La. 1989) ("Title VII was never intended to encompass sex classifications having only an insignificant effect on employment opportunities").

Petitioner has cited no case which has adopted his characterization of *Newport News* or its supposed effect on Title VII; and the post-*Newport News* decisions of this Court do not adopt Petitioner's view. For example, in *Auto. Workers* v. *Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196, 113 L. Ed. 2d 158 (1991), the Court addressed only the employment policy at issue there, which barred employment of women in cer-

tain jobs because they would be exposed to lead and its detrimental effects on fertility. That policy was illegal because it was undeniably premised on the biological differences between men and women:

> "Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone . . . Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing."

(499 U.S. at 198). Moreover, such a policy plainly violated the Pregnancy Discrimination Act, which bars discrimination predicated on the fact that only women (not men) get pregnant (*id.*)—and *Auto. Workers* cited *Newport News* only to that extent (at p. 199).

We are not aware of any case which has held that the language of *City of Los Angeles Dept. of W.& P.* v. *Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L. Ed 2d 657 (1978), which is cited in *Newport News* and relied on by Petitioner (i.e., the so-called "simple test" of "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different'") [Petition at 9] literally outlaws *any* policy with *any* difference between the sexes. Rather, that language has always been, and (NYMEX respectfully submits) must be, read in its context in *Manhart*, and in the context of the cases which have cited it.

Manhart condemned an employment policy that disfavored women only because they were women. Moreover, *Manhart* was decided *before* the Pregnancy Discrimination Act, and thus also does not represent a change in the law *because* of the enactment of the statute. The post-*Manhart* cases have not rejected the hair-length cases, much less those which were decided before *Manhart* or *Newport News*. Rather, recent cases continue to cite and rely upon the hair-length cases. See, e.g., *Seitz*, *supra* (1995 WL 745012 at *2); *Arnett*, *supra* (846 F.Supp. at 1239-40); *Cairo*, *supra* (710 F.Supp. at 1071);

Devine v. *Lonschein*, 621 F.Supp. 894, 896-97 (S.D.N.Y. 1985), *aff'd*, 800 F.2d 1127 (2d Cir. 1986).

The other decisions of this Court which Petitioner cites also do not pronounce or endorse the absolutist rule that he proposes, and are also factually distinguishable.

The issue in *Harris* v. *Forklift*, 510 U.S.17, 114 S.Ct. 367, 126 L. Ed 2d 295 (1993), was whether a female employee must show that she suffered adverse psychological effects to recover for sexual harassment. The Court's remark that the statute addresses "the entire spectrum of disparate treatment of men and women in employment" (510 U.S. at 21) was part of a discussion of when "a discriminatorily hostile or abusive environment" falls within Title VII, not whether any difference (as between men and women) whatsoever in an employment policy necessarily constitutes actionable discrimination.

Price Waterhouse v. *Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L. Ed. 2d 268 (1989), where the Court called for the application of common sense (at p. 241), addressed the burden of proof in a Title VII action. There was direct evidence that the plaintiff had been denied a partnership in the defendant accounting firm *because* she was a woman (at pp. 235-36). The Court pointed out that Title VII was enacted to prevent such a decision expressly based on one's gender; but it also cautioned:

> "Yet the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions." (emphasis in original).

(at p. 239). Indeed, the Court endorsed a "balance between employee rights and employer prerogatives" (*id.*); and it explained, after the remarks quoted by Petitioner, that "the other important aspect of the statute is its preservation of an employer's freedom of choice" (at p. 242). That (NYMEX respectfully submits) is the antithesis of the kind of absolutist rule advocated by Petitioner here.

In *Hishon* v. *King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L. Ed. 2d 59 (1984), the Court was also dealing with a decision not to make a woman a partner in a firm and to terminate her employment *because* she was a woman. The specific issues before the Court were whether a decision to invite one into a law partnership is a condition or term of employment and whether partnerships are exempt from the definition of an "employer" under the statute. The Court did not confront or pass on the contentions proffered by Petitioner at bar.

* * *

In sum, Petitioner's pronouncement that the law has changed is incorrect. What is really involved here is that Petitioner *wants* the law to change. Such a request, however, should be addressed to Congress—particularly where it would have the kind of far-reaching and disruptive societal consequences which his proposed rule would have. NYMEX respectfully submits that such an across-the-board rule-change is neither warranted nor advisable, and surely not in the context of an employer's policy which merely prescribes hair-length.

NYMEX's hair-length policy has no linkage to the biological or other immutable characteristics of one's sex; and it admittedly is not sexually offensive. It addresses a legitimate interest of an employer to maintain decorum and require a certain appearance in its workplace. The policy can readily be complied with, without offense to one's gender, by anyone who wishes to work for this employer. That is simply *not* what Congress meant to cover when it outlawed gender discrimination, or what the Court has referred to in its remarks about policies which do constitute gender discrimination.

Conclusion

The Petition for a Writ of Certiorari should be denied.

Dated: April 15, 1997

Respectfully submitted,

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